(13)

No. 84-1360

In The
Supreme Court of the United States
October Term, 1984

THE CITY OF RENTON, et al,
Appellants,

vs.

PLAYTIME THEATRES, INC.,
a Washington Corporation, et al,
Appellees.

On Appeal From The United States Court Of Appeals For The Ninth Circuit

BRIEF OF APPELLEES

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QUESTIONS PRESENTED

1. Should this Court unnecessarily reach and decide constitutional issues before the Courts below have finally decided an issue which may resolve the case without the need for further constitutional adjudication?

2. May a zoning ordinance whose operative provisions rest solely upon the content of motion pictures shown within a theatre be characterized as a time, place or manner restriction of speech?

3. Is it constitutionally permissible to regulate the location of a motion picture theatre, based solely upon the content of the films exhibited, where there is no empirical evidence to establish any secondary effect from a *single* adult theatre?

4. Does confining adult theatres to remote, commercially unviable and unavailable locations create a burden on access to the marketplace for sexually explicit motion picture films?

5. Is it constitutionally permissible for a city to rely on the experience of other cities in passing a zoning ordinance regulating adult theatres when the means chosen to remedy the perceived effects are not justified by the studies and findings of the cities upon which it relies?

6. Is it constitutionally permissible under the equal protection clause of the Fourteenth Amendment for a city to regulate the location of a motion picture theatre because of its alleged secondary effects while refusing to regulate other similar businesses?

7. Is the definition of "used" void for vagueness because it fails to establish minimal guidelines to govern local functionaries in application of the definition to a business presenting protected First Amendment materials?

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STATEMENT OF CASE

Appellants' statement of the case preposterously overstates the legislative history of Renton Ordinance No. 3526. For this reason, it is necessary to resummarize that history in order to correct the misleading impressions left by Appellants.

The genesis of the ordinance before the Court was a memorandum dated May 22, 1980 from the Mayor to the Council President (JA 411). The memorandum indicated a concern for responding to the "*public outcry*" after an adult business had obtained a license and suggested the passage of legislation "which would designate *non-acceptable enterprises/localities*" (JA 411). It is significant that the ordinance was conceived in this setting, rather than one concerned with the secondary effects, if any, of such uses.

On June 23, 1980, the Renton City Council undertook to study "the subject of adult bookstores, films and novelty shops" by referring that matter to the Planning and Development Committee of the City Council (JA 38). After almost three months of delay and no documented study, the Planning and Development Committee of the City Council recommended to the City Council that the matter be referred to the Planning Commission. On September 8, 1980, the matter was referred to the Planning Commission "for consideration at the earliest possible date" and for public hearings (JA 39-40).

On October 13, 1980, a moratorium resolution was adopted relative to the licensing of businesses selling or showing sexually explicit materials (JA 41). To the extent that any governmental interest is set forth in the legislative history of Ordinance No. 3526, it is contained in

the "Whereas" provisions of the resolution imposing the moratorium. There, the only reason asserted for the ordinance is an undocumented, unstudied, and speculative perception that a business which "sells, rents or exhibits sexually explicit material would have a severe impact upon surrounding businesses and residences" (JA 42). Accordingly, after October 13, 1980, no theatre could locate anywhere in Renton even though no findings of harm yet existed.

Approximately two (2) months later, the chairman of the Planning Commission referred the matter of "Adult Entertainment Land Uses" back to the Council for further action indicating that the Planning Commission was overburdened with priorities of a much greater magnitude (JA 289-291). After reference back, the Planning Development Committee scheduled a public meeting; however, no one showed up and the meeting was rescheduled to March 5, 1981 (JA 45). On April 6, 1981, approximately eleven months after the notion of an "adult entertainment land use" ordinance was first conceived, the Planning Development Committee filed its report with respect to "Adult Entertainment Land Use" (JA 47). The report sets forth no findings relative to the need for such an ordinance nor does it articulate or identify any compelling governmental interest that would be served by the regulation of adult motion picture theatres. Additionally, no reasons or need are specified for the locational requirements suggested by the report. From this record, it is impossible to determine what, if any, secondary effects a *single* adult motion picture theatre might present or why the focus of the ordinance suddenly shifted from "adult entertainment land uses," which was the primary concern in *Young v. American Mini Theatres,* 427 U.S. 50 (1976), to a concern about the effects of a *single* adult motion picture theatre.[1]

On April 13, 1981, as the moratorium resolution was expiring, Ordinance No. 3526, the first of three ordinances at issue here, was passed (JA 49). The recording of the Council hearing on April 13, 1981 reflects that the full Council heard no public testimony on the ordinance and passed it after approximately five (5) minutes consideration.[2] Ordinance No. 3526 provided that an adult motion picture theatre was prohibited:

> (1) Within 1,000 feet of any residential zone, *or single-family or multiple-family use;*
>
> (2) Within *one mile* of any public or private school;
>
> (3) Within 1,000 feet of any church or other religious facility or institution; and
>
> (4) Within 1,000 feet of any public park or P-1 zone.

The effect of this ordinance, even as later amended, was to virtually ban adult theatres from all commercial areas of the city and from the areas where general audience theatres may locate.

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1. Renton's ordinance does not purport to prohibit a concentration of regulated uses; rather, it is concerned with the effect that a single adult theatre would present. The ordinance has the effect of banning a single adult motion picture theatre from all areas of the city unless it can meet specified distance requirements from certain protected uses. As applied, the ordinance must be scrutinized in relation to Appellees' single theatre inasmuch as there are no other adult theatres in Renton even today (Appellants' Brief at 3, n.2) and the City acknowledges that it is concerned about the entry of even a single such use (Appellants' Brief at 25).

2. Exhibit 1 to the hearing held June 23, 1982, was a cassette tape recording produced by the City of Renton. This tape included the entire discussion of the full council in passing Ordinance No. 3526. The transcript of the hearing, found as Document 152 in the Clerk's papers, at pages 17-18, shows the admission of this tape into evidence.

Early in 1982, Appellees acquired two existing and operating theatres in the City of Renton with the intention to continue exhibiting feature-length motion pictures in them and, in at least one of them, exhibit sexually-explicit adult films. The theatre building where the sexually-explicit movies were to be exhibited was located in an area that was lawfully zoned for the use of exhibiting general audience films, but was proscribed by Ordinance No. 3526 for use as an adult theatre, prompting Appellees to commence the present action.

While the case was pending, in May, 1982, Renton enacted Ordinance No. 3629 which amended Ordinance No. 3526. The principal changes were:

(1) The amending ordinance contained an elaborate statement of the reasons for enacting both Ordinance No. 3526 and Ordinance No. 3629;

(2) A definition of the word "used" was added;

(3) Violation of the use provisions of the Ordinance was declared to be a nuisance *per se* to be abated civilly;

(4) The required distance of an adult theatre from a school was reduced from one mile to 1,000 feet; and

(5) A severability clause was added.

The amending ordinance, No. 3629, also contained an emergency clause making it effective as of the date of its passage. It was patently obvious that the amendments were prompted by the commencement of Appellees' lawsuit and were motivated by the City Attorney's desire to formulate a more defensible ordinance.[3]

3. The elaborate statement of reasons for enacting Ordinance No. 3526 contained in Ordinance No. 3629 was nothing more than an attempt on the part of the city attorney to provide some means of shielding the ordinance from the constitutional attack of Appellees. These amendments immediately followed

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On June 14, 1982, Appellants passed yet a third ordinance, No. 3637, which was identical to Ordinance No. 3629 in all respects, except that the emergency clause was deleted. The ordinance became effective thirty (30) days following its publication.[4]

Ordinance No. 3526 was passed at a time when the City of Renton had no theatres which exhibited sexually-explicit adult films. No written or recorded legislative history exists from which it is possible to discern exactly what was considered by the Renton City Council in enacting the ordinance. The independent recollection of the Planning Director, who attended all hearings relative to the enactment of the ordinance, and who personally, and through his staff, studied the question of regulating *all* adult uses, is the sole history available to us today.[5] From his testimony, and other discovery, we know that the City of Renton did *nothing* to study the effects of adult businesses, and particularly adult theatres, upon the community.

The Planning Director acknowledged that no factual testimony regarding the effects of adult entertainment uses on the neighborhood or business districts of Renton was received or considered (JA 134). To see if any reliable written material was considered, Appellees required that Renton produce all studies done or considered by the Planning Department and Planning Staff in the prepara-

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the deposition of the Planning Director who, in his testimony of March 3-4, 1982, had been unable to identify any secondary effect at which this ordinance was aimed. The fact that the distance requirement from schools was relaxed from one mile to 1,000 feet is particularly indicative of this intent. See *Krueger v. City of Pensacola,* 759 F.2d 851, 856 (11th Cir. 1985).

4. The third ordinance was passed as a response to Appellees' challenge to the second ordinance because of its inclusion of an unconstitutional emergency clause.

5. Appellants' Brief at 6, n.5; JA 131-134.

tion of the ordinance. A number of documents were produced; however, none was a study or report relative to the alleged secondary effects of an adult theatre or any other adult entertainment use. Rather, all the material produced dealt with the *legality* of regulation, not the reasons and underlying justifications for regulation (JA 166-170).[6]

To further examine the underlying factual predicate for the ordinance, the Planning Director was queried relative to his statement that he had reviewed "the summary of their findings and conclusions" relative to the City of Seattle zoning ordinance (JA 74). He admitted that what he was referring to was simply the published decision in *Northend Cinema, Inc. v. City of Seattle,* 90 Wn.2d 709, 585 P.2d 1153 (1978), cert. denied, 441 U.S. 946 (1979), and a discussion of judicial opinions that had been prepared by the Seattle City Attorney (JA 170). Although Seattle had conducted studies, none of those underlying studies was considered by Renton prior to the adoption of Renton's Ordinance No. 3526 (JA 170).

One of the concerns expressed at the Renton public hearing on March 5, 1981 about adult entertainment uses was an alleged increased incidence of assaults and prostitution. No effort was made to verify this assertion (JA 172).[7] In order to determine the magnitude of the problem, if any, Appellees requested production of:

. . . .

5. All reports, letters, studies or other forms of communications of the City of Renton Police Department

6. At least one court has indicated that a review of "how to" material is insufficient to provide a factual justification for an ordinance that burdens free speech. *Patel and Patel v. City of South San Francisco,* 606 F. Supp. 666, 671 (1985). Such material does not include any studies or abstracts of studies dealing with the deleterious impact, if any, of an adult entertainment business.

7. See infra at 24.

or *any other law enforcement agency* relative to the crime associated with the location of adult businesses in general, and in the City of Renton, in particular.

No documents were produced in response to this request.

Another concern of the public recalled by the Planning Director was an assertion that property values would be affected by adult uses. When questioned about this, he admitted that he did not contact any businesses located next to or in the vicinity of an adult business anywhere in the State of Washington to verify this assertion, *nor did he gather or attempt to gather any empirical evidence regarding this assertion.*[8]

When queried concerning the impact of an adult theatre on schools, children, churches, and parks, the Planning Director was unable to identify any "secondary effect" of any kind, let alone a "land use" effect from such a business.[9]

Contrary to what Appellants would have this Court believe, little, if anything, was studied by the Planning Department, and little, if any, of the written material available to the Planning Director was made available to the full council. In fact, much of the material available to the Planning Director was never reviewed by him (JA 168-170). Assertions and conclusions about the "secondary effects" of adult theatres, standing alone, on a record as barren as the one before this court, are not sufficient to support an ordinance which regulates speech on the basis of its content. A careful review of the record here will fail to find any fact or any admissible bit of evidence to support the belated post hoc conclusions on which the ordinance is purportedly based.

8. See infra at 24.

9. See infra at 24-26.

Finally, even if Renton had actually considered any studies done by other cities (which they clearly didn't), the studies of other cities cited in Appellants' brief at 26, n.38 were, for the most part, based on the secondary effects of *concentrations* of adult uses and not on the effect of a single theatre on its neighboring community.[10]

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SUMMARY OF ARGUMENT

The Court of Appeals correctly found, after a de novo review of the entire record and on the basis of objective evidence in the record, that Renton's motives in passing Ordinance No. 3526 were suspect. Having made this determination, it expressly remanded the matter to the District Court for further proceedings. Inasmuch as no final resolution of this issue has been made by the District Court, this Court, consistent with its rule that it should refrain from unnecessarily reaching and deciding constitutional issues, should dismiss the appeal on the basis of having improvidently noted probable jurisdiction.

Renton's ordinance cannot be sustained as a reasonable place regulation of speech because its restrictions turn on the content of speech; i.e., it is not content-neutral. If the ordinance is to be sustained, it must survive the strict scrutiny analysis mandated by *Young* and *Schad*. To survive, the ordinance's restrictions must be tailored to particular problems which are sufficiently compelling to justify the burden on First Amendment rights. The burden must be no greater than necessary to serve the asserted interest. Renton's ordinance cannot survive this scrutiny for a number of reasons. First, Renton has failed to identify any adverse secondary effect at which the ordinance is aimed. Secondly, the restrictions of the ordinance are far greater than necessary to achieve any legitimate governmental interest. Finally, the burden on protected speech is substantial.

10. The studies cited by Appellants are not generally available, are not in the record below and have not been provided to this court. We have read many of these studies and have found none which supports the proposition that a *single* adult theatre would cause secondary effects. There is no indication that these studies relate to any effects other than concentration. Additionally, none of these studies is of a "scientific nature" inasmuch as none was prepared using scientific methodology nor have they been presented to a scientific body or published in a scientific journal.

Renton's purported reliance on the experience of other cities cannot be justified because Renton relied primarily on "how to" material rather than studies or abstracts of studies. In addition, Renton has fashioned an ordinance far more restrictive than that of any city upon which it relies. The studies and experiences of those cities will not support or justify what Renton has done.

The burden on speech imposed by Renton's ordinance is substantial. For all practical purposes, access to the marketplace has been eliminated inasmuch as there are no viable or available locations within Renton. There is an intended de facto ban on adult theatres from the city. In determining what "access" means in the constitutional sense, this Court must be guided by the commercial needs of the particular mode of expression and the unique operational characteristics of such a use. Any focus on the content of the material or the fact that individual citizens may be morally offended by it, must be disregarded. If this Court were to allow nonphysical aesthetic considerations, which relate solely to the content of the protected speech, to be a basis for municipal zoning decisions, the First Amendment would no longer have any meaning or vitality.

In addition to the reasons given by the Court of Appeals, the ordinance is violative of the equal protection

guarantees of the Fourteenth Amendment and void for vagueness. Employing the "strict scrutiny" test, since fundamental rights are involved, there is no basis in the record to justify singling out adult theatres for special regulation while exempting other similar uses such as adult bookstores, adult video tape stores, bars, taverns, and burlesque theatres. Finally, in application, the operative language of the ordinance used to determine if a theatre is an adult theatre is void for vagueness. The determination of what constitutes a "continuing course of conduct" is left to the unfettered discretion of city officials. Moreover, city officials are employing a definition of "prurient interest" which means whatever the city council or vocal citizens of Renton chose it to mean.

On the record before the Court, Renton's ordinance cannot be sustained under any theory.

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ARGUMENT

I. CONSIDERATION OF THE ISSUES RAISED BY APPELLANTS IS PREMATURE IN LIGHT OF THE COURT OF APPEALS REMAND FOR A DETERMINATION OF LEGISLATIVE MOTIVE

The record below compellingly demonstrates that many of the stated reasons for Renton Ordinance No. 3526 were no more than expressions of dislike for the subject matter (App 19a-20a, 91a-94a). This fact was recognized by the magistrate and the District Court (App 31a, 44a). The Court of Appeals found, reviewing the record de novo,[11] that the record raised "at least an inference that a

11. Contrary to the suggestion of Amicus, this Court's recent decision in *Bose Corp. v. Consumers Union of United States,*

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motivating factor behind the ordinance was suppression of the content of the speech as opposed merely to regulating the effects of the mode of speech" (App 20a). Based upon its decision in *Tovar v. Billmeyer,* 721 F.2d 1260 (9th Cir. 1983) and this Court's decision in *Village of Arlington Heights v. Metropolitan Housing Development Corp.,* 429 U.S. 252, 266 (1977), the Court of Appeals further found that Renton had not rebutted this inference (App 20a).

Because of the District Court's failure to make a finding on this issue, and in light of the unrebutted inferences in the record that the ordinance was improperly motivated, the Court of Appeals expressly remanded the case for a determination of whether the motivations for the ordinance were in fact improper, and, if so, for application of the rule established in *Village of Arlington Heights v. Metropolitan Housing Development Corp.,* 429 U.S. 252, 270, and n.21 (1977) and *Mt. Healthy City Board of Education v. Doyle,* 429 U.S. 274, 287 (1977), that the ordinance must fail unless the city could prove by a preponderance of the evidence that the law would have been enacted without this factor (App. 21a).[12] That this rule still pertains is apparent from this Court's recent decision in *Hunter v. Underwood,* 471 U.S. —, 105 S.Ct. 1916 (1985).[13]

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Inc., — U.S. —, 104 S.Ct. 1949, 1958 (1984) held that "in cases raising First Amendment issues . . . an appellate court has an obligation to 'make an independent examination of the whole record' in order to make sure 'that the judgment does not constitute a forbidden intrusion on the field of free expression.' "

12. The Court of Appeals has indicated that its decision does not conclusively resolve the controversy. In denying Appellees' motion for attorney's fees, the Court noted that the motion was premature and must abide the ultimate resolution of the issue by the District Court on remand (JA 409-10).

13. It is proper to apply this rule in the context of the First Amendment in light of the repeated holdings of this Court that purposeful governmental suppression of free expression is unconstitutional. See, e.g., *Central Hudson Gas v. Public Service Comm.,* 447 U.S. 557 (1980).

Inasmuch as the District Court made no finding on the issue of intent, the Court of Appeals' remand should not be disturbed if substantial evidence in the record exists to support its finding of an inference of improper motivation. The objective evidence available to the Court of Appeals consisted of the written legislative history and the testimony of the Planning Director as to the nature of the public testimony received by the City Council.[14] No evidence of individual legislator's motives was offered or received on this issue.[15]

The available record is replete with objective signs of an improper motive. First, as found by the District Court and the Court of Appeals, many of the post hoc stated reasons for the ordinance are no more than expressions of distaste for the subject matter (App. 91a-94a). Secondly, the mile separation from schools required by Ordinance No. 3526, the first ordinance, was patently unreasonable and could only suggest an intent to restrict and suppress protected expression (App 79a). Third, the legislative process was commenced as a result of a communication from the mayor suggesting legislation to "respond to the *public outcry*" about adult businesses by designating "*non-acceptable enterprises*/localities" (JA 411).[16] Finally, an

14. The exhibits reproduced at JA 39-52 and 411 constitute the entire written legislative history. No written or tape recorded record exists of the legislative hearings preceding the adoption of Ordinance No. 3526. The only evidence of what occurred came from Renton's Policy Department Director (See n.5 supra).

15. The Ninth Circuit has held that the use of subjective post hoc testimony of an individual legislator is impermissible to show legislative intent. *City of Las Vegas v. Foley*, 747 F.2d 1294 (9th Cir. 1984).

16. The memorandum from Mayor Shinpoch to Councilman Trimm which was the genesis of this ordinance, on its face, suggests an improper motive and is totally silent with respect

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environmental checklist review sheet prepared by the Planning Department staff, which indicated that the ordinance "possibly may be too restrictive to be practical," was ignored (JA 189). In light of this record, it is hardly surprising that the Court of Appeals reached the conclusion that there was an inference of improper motive. As noted by Justice Powell in his concurring opinion in *Young*, 427 U.S. at 80, the chronology and facts surrounding legislation may suggest that a city has embarked on an effort to suppress expression.

If on remand, the District Court finds that suppression of speech was a motivation for the ordinance and that it would not have been enacted but for that fact, then under the decisions of this Court, the ordinance is facially unconstitutional in its entirety. Such a resolution would obviate the need for further constitutional adjudication. See *Brockett v. Spokane Arcades, Inc.*, 472 U.S. —, — S.Ct. — (1985) (never anticipate a question of constitutional law in advance of the necessity of deciding it). As such, Appellants' appeal to this Court is premature and this Court

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to any of the reasons now asserted by the City in support of the ordinance. This document, coupled with the meager record and legislative history surrounding the first ordinance, does not readily suggest any proper motive. In analyzing an analogous situation involving First Amendment concerns, the Eleventh Circuit in *Krueger v. City of Pensacola*, 759 F.2d 851 (1985), felt constrained to look behind the city's articulated post hoc justifications. It viewed the decisions of this Court as requiring more than simply an articulation of some interest the city could have had, saying that "[t]he government must also show that the articulated concerns had more than merely speculative factual grounds, and that it was *actually* a motivating factor . . . ." 759 F.2d at 855 (emphasis added). The Court found that judicial deference to "legislative psyche" did not mandate that they turn "a deaf ear to a record that establishes with unmistakable clarity the actual motives of the legislators . . . ." 759 F.2d at 856.

should refrain from unnecessarily reaching and deciding the constitutional issues raised by the Appellants.

II. RENTON'S ORDINANCE CANNOT BE SUSTAINED AS A REASONABLE TIME, PLACE OR MANNER RESTRICTION ON SPEECH

In *Young,* a majority of the Court found that the Detroit ordinances could be sustained as a reasonable place regulation of speech. *Young,* at 64, n.18 and 73 (Powell, J., concurring in Part II). Subsequent rulings by this Court require reexamination of this holding.

This Court has recognized the validity of reasonable time, place or manner regulations that serve a significant governmental purpose and leave ample alternative channels for communication. See *Clark v. Community For Creative Non-Violence,* 468 U.S. —, 105 S.Ct. 3065 (1984); *Linmark Associates, Inc. v. Willingboro,* 431 U.S. 85, 93 (1977); *Virginia Pharmacy Board v. Virginia Citizens Consumer Council,* 425 U.S. 748, 771 (1976). See also *Kovacs v. Cooper,* 336 U.S. 77, 104 (1949) (Black, J., dissenting). The essence of a time, place or manner regulation lies in the recognition that various methods of speech, regardless of their content, may frustrate legitimate governmental goals. *Consolidated Edison Co. v. Public Serv. Comm'n,* 447 U.S. 530, (1980):

> However, regulations of speech which are based upon the content of the speech stray beyond the recognized limits of a valid time, place or manner restriction.
>
> A restriction that regulates only the time, place or manner of speech may be imposed so long as it is reasonable. But when regulation is based on the content of speech, governmental action must be scrutinized more carefully to ensure that communication has not been prohibited "merely because public officials disapprove the speaker's views." *Niemotko v. Maryland,* 340 U.S. 268, 282 (1951) (Frankfurter, J., concurring in result). *Consolidated Edison Co.,* 447 U.S. at 536.

This Court has often repeated the rule that time, place and manner restrictions must be applicable to all speech, irrespective of content.

> Governmental action that regulates speech on the basis of its subject matter 'slip[s] from the neutrality of time, place and circumstance into a concern about content.' *Police Department of Chicago v. Mosley,* 408 U.S. 92, 99 (1972), quoting Kalven, The Concept of the Public Forum; *Cox v. Louisiana,* 1965 Sup. Ct. Rev. 1, 29. Therefore, a constitutionally permissible time, place or manner restriction may not be based on either the content or subject matter of speech. See, e.g., *Consolidated Edison Co.,* 447 U.S. at 536.

There can be no serious question that the Renton ordinances at issue here base their restrictions on the content of the speech involved in the motion pictures exhibited. The ordinances do not regulate the location of movie theatres; rather, they regulate where movies of a specified subject matter and content may *not* be shown. Appellees' theatre is properly located in a zone which allows motion picture theatres. It has existed as a motion picture theatre at its present location for several decades. Simply put, Renton's ordinances seeks to regulate and control the image on the screen inside the theatre. As a consequence, the ordinance cannot be sustained as a content-neutral time, place or manner regulation of speech. If it is to survive, it must do so under the strict scrutiny applied to ordinances restricting or regulating speech on the basis of its content.

III. RENTON'S ORDINANCE IS VIOLATIVE OF THE FIRST AMENDMENT

1. This Court Has Developed An Analytical Framework For Scrutinizing Zoning Ordinances Which Impinge Upon Fundamental Freedoms

Young, supra, is the seminal decision of this Court from which all municipal attempts to regulate the location

of adult businesses through zoning have flowed. The ordinances at issue in *Young,* "instead of concentrating 'adult' theatres in limited zones," required that "such theatres be dispersed." Id. at 52. They provided that an adult theatre could not locate "within 1,000 feet of any two other 'regulated uses' or within 500 feet of a residential area." Id. "Regulated uses" included ten different kinds of establishments in addition to adult theatres.[17] Significantly, the ordinance was an amendment to an "anti-skid row ordinance" which had been adopted ten years earlier. Id. at 54. In the opinion of urban planners and real estate experts who supported the ordinances, the location of *several* such businesses in the same neighborhood tend "to attract an undesirable quantity and quality of transients, adversely affects property values, causes an increase in crime, especially prostitution, and encourages residents and businesses to move elsewhere." Id. at 55.[18]

In *Young,* there was "no claim that distributors or exhibitors of adult films are denied access to the market, or conversely, that the viewing public is unable to satisfy its appetite for sexually explicit fare." Id. at 62. The same is not true here. Appellees alleged and the Court of Appeals found that there was a substantial diminution of ac-

17. The other regulated uses were adult book stores, cabarets (group "D"), establishments for the sale of beer or intoxicating liquor for consumption on the premises, hotels or motels; pawn shops, pool or billiard halls; public lodging houses, secondhand stores, shoeshine parlors, and taxi dance halls. *Young,* 427 U.S. at 52, n.3.

18. No finding was made in *Young,* or any other case Appellees are aware of, that a *single* adult business, including an adult theatre, would produce the same adverse secondary effects as would several such businesses locating in the same area. In fact, as this court held in *Young,* per Justice Powell: "Most of the ill effects . . . appear to result from the clustering itself rather than the operational characteristics of individual theaters." *Young,* 427 U.S. at 82, n.5 (Powell, J., concurring).

cess to the marketplace for these nonobscene press materials (App. 13a).

The plurality opinion in *Young* held "that the State may legitimately use the content of these materials as the basis for placing them in a different classification from other motion pictures." Id. at 70. This holding was based upon the rationale offered by the Detroit Common Council that a "*concentration* of 'adult' movie theaters causes the area to deteriorate and become a focus of crime, effects which are not attributable to theaters showing other types of films." Id. at 71, n.34. The plurality opinion found that the record disclosed a sufficient factual basis for this conclusion. The essence of the plurality opinion, as evidenced by Justice Stevens' later writings, appears to be that the speech involved caused demonstrable adverse secondary effects.[19]

Justice Stevens, writing for the plurality, opined that "[t]he situation would be quite different if the ordinance had the effect of suppressing, or greatly restricting access to, lawful speech," pointing out that the Detroit ordinances did "not affect the operation of existing establishments, but only new ones." Id. at 71, n.35. Absent the secondary effects, which provided a compelling governmental interest for regulation, the plurality was committed to the proposition that "the First Amendment means that government has no power to restrict expression because of its message,

19. See *Members of City Council v. Taxpayers for Vincent,* — U.S. —, 104 S.Ct. 2118, 2129 (1984); *Bolger v. Young Drug Products Corp.,* — U.S. —, 103 S.Ct. 2875, 2888 (1983) (Stevens, J., concurring in the judgment); *Metromedia Inc. v. San Diego,* 453 U.S. 490, 550 (1981) (Stevens, J., dissenting in part); *Schad v. Borough of Mount Ephraim,* 452 U.S. at 80, 83 (Stevens, J., concurring in judgment). *Consolidated Edison Co. v. Public Serv. Comm'n,* 447 U.S. 530, 548 (1980) (Stevens, J., concurring in judgment); *F.C.C. v. Pacifica Foundation,* 438 U.S. 726, 744-748 (1977);

its ideas, its subject matter, or its content." (Citations omitted) Id. at 65.

Justice Powell, whose concurring opinion represents the holding of the Court,[20] provided a distinctly different analysis. He placed a "substantial burden" on the state to justify its ordinances. Id. at 76. He viewed the inquiry for First Amendment purposes as looking "only to the effect . . . upon freedom of expression." Id. at 78. Part of this inquiry involves determining whether the ordinance restricts "in any significant way the viewing of these movies by those who desire to see them?" Id. On the record in *Young,* Justice Powell found the restrictions "incidental and minimal." Id. Justice Powell was careful to point out, however, that if the ordinances had been enacted "in an effort to protect citizens against the *content* of adult movies," the ordinances would not have withstood constitutional scrutiny. Id. at 81, n.4.

This Court's decision in *Schad,* supra, clarified many of the questions raised by *Young.* There, Justice White said, in writing for the majority:

> [W]hen a zoning law infringes upon a protected liberty, it must be narrowly drawn and must further a sufficiently substantial government interest. 452 U.S. at 68.

Another requirement is that the Court determine "whether those interests could be served by means that would be less intrusive on activity protected by the First

20. In *Marks v. United States,* 430 U.S. 188, 193 (1977), this Court held: "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . .'" Justice Powell's opinion was the opinion which concurred in the judgment on the narrowest ground.

Amendment." Id. at 70. Most importantly, *Schad* presented an analytical framework for scrutinizing zoning ordinances restricting First Amendment rights. First, the majority required supporting evidence for legislative assertions of reasons for enacting restrictive zoning laws. Finding that the asserted legislative reasons of *Mt. Ephraim* were "not immediately apparent as a matter of experience" (Id. at 73), the majority said:

> [We] must assess the exclusion of live entertainment in light of the commercial uses *Mt. Ephraim* allows, not in light of what the Borough might have done. Id. at 75.[21]

Finally, the concurring opinions make it abundantly clear that the burden is on the zoning authority "to articulate, and support, a reasoned and significant basis for its decision" [Id. at 77 (Blackmun, J., concurring)] and to demonstrate "an identifiable adverse impact." Id. at 83 (Stevens, J., concurring in judgment).[22]

2. Zoning Laws Which Infringe Upon A Protected Liberty Must Be Narrowly Drawn And Serve A Compelling Governmental Interest.

As a general matter, "The First Amendment means that government has no power to restrict because of the message, its ideas, its subject, or its content." *Police Department of Chicago v. Mosley,* 408 U.S. 92, 95 (1972). Governments must not be allowed to choose "which ideas

21. In the instant situation, the Court must assess the exclusion of adult theatres in light of the fact that Renton allows other commercial adult uses such as adult bookstores, adult video tape stores, massage parlors, bars, taverns, burlesque theatres, etc., and all the uses regulated by Detroit. (See n.17, supra).

22. It is not appropriate to utilize the test formulated in *United States v. O'Brien,* 391 U.S. 367, 376-377 (1968) because the restriction on freedom of expression is substantial. See *Schad,* 452 U.S. at 69, n.7.

are worth discussing or debating . . . " 408 U.S. at 96. Nevertheless, governmental regulation based on subject matter has been approved in narrow circumstances. Such a regulation may be sustained "only if the government can show that the regulation is a precisely drawn means of serving a compelling state interest." *Consolidated Edison Co. v. Public Serv. Comm'n,* 447 U.S. at 540.

In the context of the ordinance now before the Court, it is recognized that the power of local governments to zone and control land use is broad and its proper exercise is an essential aspect of achieving a satisfactory quality of life in both rural and urban communities. *Schad v. Mount Ephraim,* 452 U.S. at 68 (1980). However, the zoning power "must be exercised within constitutional limits." *Moore v. East Cleveland,* 431 U.S. 494, 514 (1977) (Stevens, J., concurring in judgment). When a zoning law infringes upon a protected liberty, it must be "narrowly drawn" and further a "substantial governmental interest." *Schad,* 452 U.S. at 68.

Determining whether an ordinance meets this test requires "the courts to weigh the circumstances and appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of [First Amendment] rights." *Schneider v. State,* 308 U.S. 147, 161 (1939). In addition, the court must also "determine whether those interests could be served by means that would be less intrusive on activity protected by the First Amendment." *Schad,* 452 U.S. at 70. Mere assertion of an important, legitimate interest does not satisfy the requirement that the challenged restriction specifically and precisely serves that end. See *Hynes v. Oradell,* 425 U.S. 610 (1976). See also *Cox v. Louisiana,* 379 U.S. 536, 557-558 (1965) (restriction must be applied uniformly and nondiscriminatorily). The court must examine carefully the importance of

the governmental interests advanced and the extent to which they are served by the challenged regulation. *Schad,* 452 U.S. at 71. "[T]he zoning authority must be prepared to articulate and support a reasoned and significant basis for its decision. This burden is by no means insurmountable, but neither should it be viewed as *de minimis.*" *Schad,* 452 U.S. at 77 (Blackmun, J., concurring).

In the case before the Court, Renton has restricted a particular mode of presenting a specified kind of speech from all commercial areas of the city while allowing that mode, presenting other kinds of speech, free access to all areas of the city. The test of these restrictions *must* be "strict scrutiny."

3. The Governmental Interest Asserted By Renton Will Not Withstand Scrutiny.

Because the geographic configuration and commercial qualities of a city play an important role in determining the reasonableness of and need for a zoning law, it is relevant to examine these facets of Renton's character.

Appellants attempt to paint a picture of Renton as a small bedroom community of residences, parks, churches, local shopping centers, and minimal commercity activity.[23] In fact, Renton is an active commercial and industrial city. The City of Renton is located at the southern end of Lake Washington. It is the third largest city in King County and the twelfth largest city in the State of Washington.[24] Renton's economy is based on a strong manufacturing complex coupled with a diversified industrial/service complex. The largest employer and taxpayer within the City of Renton is the Boeing Commercial Airplane

23. Appellants' Brief at 4.
24. 1983 Renton Annual Report, Table 21.

Company, which has two manufacturing facilities in Renton next to the Renton Airport on the shores of, Lake Washington. The larger facility manufactures commercial jet aircraft (models 707, 727, 737, and 757).[25] The second largest factor in the city's manufacturing complex is Pacific Car and Foundry Company (PACCAR Incorporated). PACCAR has two manufacturing facilities, a truck parts warehouse and a computer center within the city. The manufacturing facilities produce railroad cars and carco winches.[26]

There are 200 manufacturing firms in the Renton service area and a total of 290 distributor type firms.[27] Some of the manufacturing firms are distribution outlets as well. Over 68,000 persons are employed in manufacturing in the Renton service area.[28] Renton is home to 19 separate banks.[29] In 1982, Renton issued permits for construction of 57 industrial, office and other institutional, nonresidential, projects valued at $22,937,000.[30] In 1983, permits were issued for similar projects valued at over $37,839,000.[31] Over 1,489 businesses are located in Renton, employing over 80,839 persons.[32]

It is in this setting that the Court must scrutinize the governmental interests asserted by Renton.

The first question to ask is what compelling governmental interests have been asserted by Renton to justify

25. Id.
26. Id.
27. Id.
28. Market Profile Analysis, Seattle-Everett, Wa., SMSA, 1984 Edition, published by Donnelley Marketing Information Services.
29. Id.
30. Id.
31. Id.
32. Id.

these ordinances. Ordinance No. 3526, on its face, asserts no reasons for its enactment (App 78a-80a). No record of the public hearings was made or preserved.[33] The city official who attended the original hearings testified that hearings were held, but little else (App 17a). Renton cannot point to any preenactment evidence in the record to justify the ordinance. In fact, the preenactment evidence strongly suggests that the ordinance was motivated by a desire to restrict constitutionally protected speech (JA 39-52, 411).

Ordinance No. 3637, adopted over a year after Ordinance No. 3526, and after the commencement of this lawsuit, contains a lengthy recitation of testimony allegedly received in support of the original ordinance (App 90a-91a). However, the statement of findings is a patent fabrication and invention. It is not supported by any record or testimony.

Despite the sanctity and reverence Appellants attach to the legislative process, the individual responsible for shepherding the ordinance through the process was not able to articulate any substantial reason to justify the ordinance from a "land use" point of view. He agreed that the only difference between a motion picture theatre and an adult motion picture theatre was the image on the screen (JA 176). As a land use professional, he could only identify two operational characteristics of an adult theatre different from other theatres; i.e., an unsupported opinion that the amount of traffic would increase because an adult theatre *might* draw from a larger area and a potential for garrish advertising signs on the exterior of the structure (JA 176-177). He acknowledged that the city has both a sign ordinance and a traffic code which it enforces (JA 177).

33. See notes 5 and 14, supra.

Additionally, the Planning Director was either unable to identify or support any of the alleged "secondary effects" the Appellants so fervently assert were studied and found to exist. When asked on what he based his conclusion that there would be an increase in the crimes of assault and prostitution from the location of a single adult theatre, the Planning Director said (JA 172):

> To the best of my recollection, there was discussion at at least one of the policy or planning development committee meetings at which there was testimony given that crime of that type would be or could be expected with the implementation of adult entertainment.

He could not recall whether that testimony came from citizens or from a police department representative, nor did he attempt to verify this conclusion by contacting any small city within the State of Washington where one or two adult businesses were located (JA 172).

Another of the post hoc findings of the ordinance, made without any evidence, is that property values would be affected by an adult entertainment use. The Planning Director admitted that he had not contacted any business located next to, or in the vicinity of, an adult business anywhere in the State of Washington to verify this assertion (JA 174).

Asked about the adverse impact on children from an adult theatre located in the city's commercial areas, the Planning Director was not able to articulate what that impact would be (JA 190-191).

> Q. What adverse impacts would there be on children? How would the mere image on the screen inside the building affect children?
>
> A. As I recall the concerns, the public testimony was that material could have an effect on the people going and coming from the theatre and that as a result the children being educated could be affected.

> Q. How?
>
> A. I am not sure that I can answer that.
>
> Q. So there was a perceived adverse impact, but you can't identify for me today exactly what that impact would be.
>
> A. I think that's correct.

When asked about the adverse impact on churches, the Planning Director said (JA 191):

> Q. Let me ask you the same question with respect to churches. What adverse impact would the operational characteristics of an adult motion picture theatre have on churches?
>
> A. I believe that one of the characterizations made in the public testimony was that some parishioners might choose not to attend churches in the vicinity of adult motion picture theatres.
>
> Q. . . . [W]as there any testimony the location of an adult theatre would adversely affect the church other than some people may not want to go to church?
>
> A. To the best of my recollection, that's the gist of the testimony that was heard.

With respect to public and quasi-public buildings, he stated (JA 191):

> A. I believe in particular the comment related to public parks and it followed the same general area of concern as was related to schools.
>
> Q. And you can't identify what those impacts would be, just that people were concerned.
>
> A. That's correct.

Finally, when asked to identify the adverse effects on neighborhoods, he said (JA 192):

> Q. And what operational characteristic of an adult motion picture theatre would adversely affect residential zones or uses?
>
> A. I believe it was the same area of concern as with schools and parks.
>
> Q. In other words, somebody perceived there may be adverse impacts but couldn't identify what those specific effects or adverse impacts would be?
>
> A. I can't restate them for you, no.

The Planning Director was totally unable to identify with any particularity the secondary effects at which the ordinance was aimed and acknowledged that there was no document, recording or record which could be looked at to determine the exact adverse impacts of adult uses on churches, schools, children, public parks and residential zones that the city council was attempting to address (JA 192-193). Having failed to identify any specific evils at which the original ordinance was aimed, Renton has totally failed to establish a compelling governmental interest or show that the regulations are narrowly drawn to serve that interest. How can this Court, or any court, perform the delicate task of determining whether Renton has chosen the least restrictive alternative to implement any alleged compelling governmental interest where the city has not even identified a demonstrable evil at which the ordinance is truly aimed?

The record below fails to demonstrate any "secondary effect" on society from the mere presence of a single adult theatre in proximity to the protected uses, nor is it "immediately apparent as a matter of experience" that a single adult theatre would pose problems more significant than those associated with general audience theatres or other adult businesses not subject to the restriction of this ordinance, such as taverns, bars, topless dance clubs, adult bookstores, burlesque theatres, etc. *Schad,* 452 U.S. at 73. This ordinance is not narrowly drawn to respond to what might be the distinctive problems arising from a single adult theatre. *Schad,* 452 U.S. at 74. In short, Renton has not sustained its burden of proving that a more selective approach[34] would fail to address the unique prob-

34. e.g., One less restrictive approach would be to prohibit pictorial advertising which could be viewed from the street by passersby.

lems, if any there be, of an adult theatre and that "its interests could not be met by restrictions less intrusive on protected forms of expression." *Schad,* 452 U.S. at 74.

4. Renton's Ordinance Cannot Be Justified By The Experiences Of Detroit And Seattle.

Appellants suggest that they may fashion an ordinance wholly different from that enacted by any other city by merely *asserting* that they had the same concerns in mind as those other cities.[35] Even if Renton need not establish its own factual predicate in every context, it may not justify this ordinance on the experience of other cities where those cities studied different problems and/*or chose other less restrictive means to solve the problems studied.*[36]

In Detroit, the city fashioned an ordinance that required the dispersal of adult theatres and other regulated uses based upon the opinion of urban planners and real estate experts that the concentrating of *several* such businesses in close proximity to one another caused demonstrable secondary effects. *Young,* 427 U.S. at 55. The ordinances in *Young* eliminated no businesses and left available a myriad of locations *throughout the city* where adult theatres could locate. The evidence in *Young* suggested the broad proposition that the clustering together of eleven different kinds of regulated uses, causes identifiable secondary effects. The evidence presented there does not support the much narrower proposition that a single adult

35. See Appellants' Brief at 21-29.

36. In *Patel and Patel v. City of South San Francisco,* supra, the court refused to blindly accept the proposition (urged by Appellants here) that "[a] legislative body is entitled to rely of the experience and findings of other legislative bodies as a basis for action" [*Genusa v. City of Peoria,* 619 F.2d 1203, 1211 (7th Cir. 1980)], pointing out that the defendants could not point to a single instance in which a municipality had made a finding of fact—or other reference—having to do with an "adult motel."

theatre would, alone, have similar or greater secondary effects than other uses not regulated.[37] In fact, experience teaches us otherwise.[38]

The experience of Detroit supports only a *dispersal* of regulated uses. Appellants have chosen to ignore that experience; i.e. the studies and testimony which supported that conclusion. They have, instead, adopted a much more restrictive approach than Detroit; i.e. they have banned adult theatres from all areas of the city unless the theatre is the prescribed distance from certain other uses. In application, there are no locations in a commercial area of the city. Having ignored the experience of Detroit, Renton must supply its own justification for restrictions that are of a completely different kind than those of Detroit and impose a significantly more substantial burden on First Amendment protected expression.

37. While Appellants have asserted that many secondary effects exist from a *single* adult theatre (Appellants' Brief at 25-26), they have not offered any evidence to support that assertion. See n.10, supra. An undeliberated and speculative legislative history will not support, on the basis of *Young*, an ordinance which regulates the location of the first and only adult theatre in Renton. See *754 Orange Ave., Inc. v. City of West Haven, Conn.*, 761 F.2d 105, 112 n.6 (2nd Cir. 1985).

38. The Appellees, until recently, operated an "adult" theatre in Pasco, Washington, a city similar in size to Renton. In June, 1980, writing to the City Manager of Tacoma about the effects of an adult theatre locating in the commercial core of the city, the Pasco City Manager noted that when the theatre opened, there was a "hue and a cry" about the alleged effect of showing adult films. After approximately three years' experience with the theatre, the City found its fears to be groundless. "His adult theater (the only one in town) has not ruined adjoining businesses, and from what I can gather from my city hall vantage point, people around here have accepted the Theater and now have very little adverse to say about it. As a matter of fact, I have not had a single complaint about the operation in about a year." He went on to note that the downtown business community had accepted the theatre and that renovations made to it by Appellees had removed what had previously been an eyesore. A copy of this letter is included as Appendix A to this brief.

Likewise, Appellants can find no support for their ordinance in the experience of Seattle. The Seattle ordinance, found constitutional in *Northend Cinema*,[39] prohibits adult theatres in all zones of the city except for the CM (metropolitan commercial), BM (metropolitan business) and CMT (temporary metropolitan commercial) zones. Seattle, more precisely, confined adult theatres to the central commercial center of Seattle leaving available many commercially viable locations.

The only significant similarity between Renton's ordinance and those of Seattle and Detroit is that they all base their restrictions on the content of speech. Their dissimilarities in approach and means are striking. As the Court of Appeals observed, the conclusions, findings and studies in Detroit and Seattle will simply not support Renton's ordinance. Its restrictions go far beyond the type of ordinance that the findings of Detroit and Seattle would support.

Allowing a city to mimmick other ordinances and rely solely on their "experiences" is risky business. The experience of other cities is not and should not be dispositive in determining whether a compelling governmental interest exists for a particular city.[40] In *Metromedia, Inc. v. San Diego*, 453 U.S. 490, 528 (1981), Justice

39. Appellees believe *Northend Cinema* was wrongly decided. In any event, the decision has no precedential value in this Court. *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983).

40. In *Krueger v. City of Pensacola*, supra, an ordinance regulating topless dancing was challenged. Speaking directly to the issue of the City of Pensacola relying on the experience of another city, the Court said that merely mimicking another ordinance which had been found constitutional was not sufficient. The Court specifically pointed out that the crime control problems associated with topless dancing in Cocoa Beach [*Grand Falloon Tavern, Inc. v. Widmer*, 670 F.2d 943 (11th Cir.), Cert. Denied, 459 U.S. 859 (1982)], simply did not exist in Pensacola.

Brennan, speaking to this issue, said: "I would not be so quick to accept legal conclusions in other cases as an adequate substitute for evidence *in this case* . . ." (Emphasis in original). The so called "secondary effects" of an adult theatre undoubtedly depend upon a number of factors other than the mere existence of the theatre. As noted by Justice Powell in *Young,* "most of the ill effects . . . appear to result *from the clustering itself rather than the operational characteristics of individual theatres.*" 427 U.S. at 82, n.5. To the extent that Renton's ordinance deviated from a dispersal ordinance to a much more restrictive one, this Court must require Renton, as the Court of Appeals said, "to justify its ordinance in the context of Renton's problems—not Seattle's or Detroit's problems."[41]

5. Renton's Ordinance Is Premised Upon An Intent To Suppress Constitutionally Protected Speech.

Other than the experiences of other cities, the findings contained in the preamble to Ordinance No. 3637 articulate only a distaste for the speech that is found in adult theatres. If the material presented in adult theatres offends the sensibilities of some, the ability of government "to shut off discourse solely to protect others from hearing it [is] dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner." *Cohen v. California,* 403 U.S. at 21. The fact that in some settings, the operational characteristics of a business may justify appropriate regulations (e.g. an anti-concentration ordinance) does not justify an ordinance which subjects a business to additional restrictions premised or nothing other than a distaste for the type of speech there presented.

41. App. 17a.

At best, the findings of Ordinance No. 3637 suggests a purely aesthetic state interest to justify the restrictions on speech. Appellees allege, and the Court of Appeals found, that the asserted interest in aesthetics here is only a facade for content-based suppression (App. 19a). In *Members of City Council v. Taxpayers for Vincent,* supra, this Court recognized that in limited circumstances, a properly proven aesthetic interest can justify a restriction on the operational characteristics of a mode of expression. However, the point made in Justice Brennan's dissent, 104 S.Ct. at 2138, is particularly opposite to the Court's inquiry in this case:

> An objective standard for evaluating claimed aesthetic judgments is therefore essential; for without one, courts have no reliable means of assessing the genuineness of such claims.
>
> . . . In short, we must avoid unquestioned acceptance of the City's bare declaration of an aesthetic objective lest we fail in our duty to prevent unlawful trespasses upon First Amendment protections.

Renton has failed to independently identify any significant adverse secondary effect caused by the operation of a single adult theatre. Renton has also failed to identify any operational characteristic of a single adult theatre that would make its location a nuisance in either a commercial or residential area. As Renton has not prohibited all theatres from the commercial and neighborhood areas of the city, Renton's ordinance cannot be said to be genuinely concerned with the place of speech. Rather, it is only concerned with creating restrictions on the permissible locations for presenting constitutionally protected speech which it finds offensive. On this record, it cannot be said that Renton was attempting "to promote aesthetic values or any other value 'unrelated to the suppression of

free expression.'" *Linmark Associates, Inc. v. Willingboro,* 431 U.S. 85, 93 (1977).

Renton simply has not demonstrated that the conversion of a single existing theatre building in the core of Renton's commercial district from a general audience theatre to an adult theatre will have "an identifiable adverse impact on the neighborhood or on the [City] as a whole." *Schad,* 452 U.S. at 83 (Stevens, J., concurring).

Moreover, it is apparent that Renton's ordinance, in its second and third versions, was intended to protect citizens against the content of "adult" movies. Most of the twenty reasons given as forming the basis for adopting the original ordinance reflect a protective intent rather than a finding of adverse impact.[42] Similar protectionism is seen in a majority of the "findings" from the February 25, 1982 public hearing.[43] These later "findings" (in reality conclusory statements) support no compelling governmental interest related to a demonstrable secondary *land use* effect of the location of an *adult* theatre. Rather, they express an impermissible reason for regulation; i.e., a distaste for the speech involved and a judgment that the speech involved is morally offensive. For example, Finding No. 2 states:

> Location of adult entertainment land uses on the main commercial thoroughfares of the city gives an impression of legitimacy to, and causes a loss of sensitivity to the adverse effect of pornography upon children, established family relations, respect for marital relationship and for the sanctity of marriage relations of others, and the concept of nonaggressive, consensual sexual relations (App. 95a).

42. App. 91a-94a, particularly Findings 1, 2, 3, 4, 6, 7, 11, 16, 17, 18, 19 and 20.

43. App. 95a-96a, particularly Findings 1, 2, 3, 5, 6, and 7.

This is an assertion of a value judgment about the material exhibited. Nowhere in the legislative record is such a "finding" justified by the testimony or affidavits of any social scientist or other competent expert.[44]

As another example, Finding No. 6 asserts that the location of adult land uses in certain areas "will cause a degradation of the community standard of morality" and "pornographic material will have a degrading effect upon the relationship between spouses" (App. 96a). This finding does not assert a compelling governmental "land use" interest. It is instead a moral judgment impermissibly used in an attempt to justify a restriction on constitutionally protected expression under the thinly veiled guise of a "land use" scheme.

In essence, Renton's "findings" are simply those of an aversion to a particular type of constitutionally protected speech and to the places where such speech is presented. These types of "findings" are vastly different than the findings of the Detroit Common Council in *Young.* Renton's findings cannot be predicated upon the research, testimony and experience of the Detroit Common Council in dealing with the "land use" effects from the concentration of eleven different kinds of regulated uses within a limited geographic area. Detroit made no finding that the location of a single regulated use, including an adult theatre, within the commercial or neighborhood areas of its city would have a deleterious effect; and, more importantly, it made no finding that the location of a single adult use

44. Neither Detroit (*Young,* supra) nor Seattle (*Northend Cinema,* supra) considered the effect of pornography upon established family relations, the marital relationship or the concept of nonaggressive, consensual sexual relations. A likely reason is that these are simply not "land use" considerations. Renton simply invented these "findings" after the commencement of this lawsuit in an attempt to justify the ordinance.

would cause "a loss of sensitivity to the adverse effect of pornography upon children, established family relations, respect for the marital relationship and for the sanctity of marriage relations of others, and the concept of nonaggressive, consensual sexual relations," or that such a use would have a degrading effect upon the relationship between spouses.

Viewed in the context of a legislative history that offers not one shred of support for such findings, the only conclusion to draw is that the ordinance was passed as a result of public distaste for the speech involved and with an intent to ban it from the city's borders.

6. "Reasonable Access" To The Marketplace For Speech Materials Requires More Than Just Designating Land Area Where It Is Permissible For An Adult Theatre To Locate.

Implicit in *Young* was the conclusion that a zoning ordinance "that does not reduce significantly the number or *accessibility* of theatres presenting particular films, stifles no expression." *Young*, 427 U.S. at 81, n.4 (Powell, J. concurring). The Court's footnote 35 began:

> The situation would be quite different if the ordinance had the effect of suppressing, or greatly restricting access to lawful speech.

In *Schad*, it was not necessary for the Court to evaluate the meaning of "reasonable access" in different contexts as there were no locations where one could lawfully present live entertainment. Here, however, the issue is directly presented. The effect of Renton's ordinance on public access to sexually-oriented movies is substantial.[45]

45. The Court of Appeals and the magistrate found that a substantial part of the so called available land is occupied by (1) a sewage disposal site and treatment plant; (2) a horse racing track and environs; (3) a business park containing buildings

(Continued on following page)

The real and intended effect is to make it commercially impractical for a distributor to enter the marketplace to the end that sexually-oriented movies never become available. While Renton does not deny that this is the intent and practical effect of its ordinance, it asserts that the mere designation of the availability of land, regardless of its commercial viability or its actual availability, is sufficient to avoid offending the First Amendment.[46] No court that has considered this assertion has accepted it.[47] As a matter of first impression, the issues of access and "availability" must be analyzed in the context of the commercial needs of a motion picture theatre, traditional zoning principles and the supportable legislative findings.

A motion picture theatre, whether it be a general release theatre or an adult theatre, is a people-oriented business. It must be located in a people-oriented environment that has regular nighttime traffic and complimentary businesses, such as fast-food outlets and restaurants (JA 230). A theatre location must be a place that people are willing to go to in the nighttime, and which provides easy parking and is generally a focal point of nighttime recreation activity (JA 230). Unrebutted expert opinion from the theatre operations manager of the largest general release theatre operator in the State of Washington was admitted to the effect that, with the exception of one location, all of the 520 acres of allegedly available land is "totally unsuited for use by a retail/recreation oriented

(Continued from previous page)

suitable only for industrial use; (4) warehouse and manufacturing facilities; (5) a Mobil Oil tank farm; and a fully-developed shopping center (App. 13a-14a, 41a-42a).

46. Appellants' Brief at 29-35.

47. See, e.g., *Purple Onion, Inc. v. Jackson*, 511 F.Supp. 1207 (N.D. Ga. 1981) and *Basiardanes v. City of Galveston*, 682 F.2d 1203 (5th Cir. 1982).

business such as a motion picture theatre."[48] In addition, while the area comprising the 520 acres is adequately served by roads, accessibility is difficult. Most of the 520 acres is so remotely located in relation to normal arterial traffic through the City of Renton that accessibility is difficult and confusing. In addition, none of the area within the 520 acres is near any area enjoying even minimal nighttime activity (JA 231).

A second expert testified that the same criteria used for choosing commercially viable sites for general audience theatres are also used to locate adult theatres (JA 283). For essentially the same reasons, this additional expert opined that the entire 520 acres, with one exception, was totally unsuited for an adult theatre (JA 241).

Even the city's own Planning Director testified that an appropriate land use area for a motion picture theatre might be in a neighborhood, "but [more] likely in an area where more general business activities occurred" (JA 175). He acknowledged that a motion picture theatre is a commercially oriented kind of business and that such businesses tend to locate in "areas where there is [sic] other commercial businesses generally of the same nature or intensity" (JA 176). Commercial businesses tend to locate together because of "compatibility of use, sharing of customer trade and traffic, activities of that type" (JA 176). The absurdity of forcing adult theatres to locate in industrial zones is clearly articulated by the city's own

48. JA 231. The *one* location which is potentially suitable is the small circled area on the map at JA 215. This area is prominently mentioned by Appellants in their brief at page 31 because it is, in fact, the only commercially viable site. However, this location is not suitable because of size limitations (JA 231) and is just a small dot when compared to the 520 acres of totally unsuitable sites.

Planning Director. While discussing the majority of the area where an adult theatre may locate, he said (JA 126):

> I would think that as the most appropriate land use for the area that we would not be in favor of use other than an industrial use in that zoning:

It is important to note that practically none of the so-called "available" land is actually available for sale or lease (JA 216-228). A substantial portion of the 520 acres of legal locations is owned by Burlington Northern, Inc., a railroad company, and is criss-crossed with railroad tracks and spurs. Unrebutted testimony indicated that the corporate policy of Burlington Northern, Inc. was to reserve all of this land for rail user tenants and that the property would not be available for sale or lease to a theatre of any kind (JA 221). Land owned by the city was included within the "available" area even though the city acknowledged it would not sell or lease the land for an adult theatre use (JA 126, 223). A number of the parcels within the 520 acres were simply too small for construction of a theatre.

By restricting adult theatres to an area where no sites are in fact available and/or the available sites are not commercially viable, the city has effectively banned them. Appellees believe this result was intended. There can be no doubt that the *burden on speech is substantial if a theatre cannot find a location.* The result is the same as an outright ban. There is simply a de facto rather than a de jure ban on speech. If such a situation exists, as it does here, Appellees submit that unsupported and speculative land use concerns must give way to the paramount interests protected by the First Amendment, particularly where, as here, the record fails to reveal anything more than mere assertions to justify the ordinance and no effort has been made to utilize less restrictive means to cure

whatever problems the city may believe to inhere in the operational characteristics of a *single* adult theatre.

Other courts that have considered the question of "reasonable access" and "available locations" have done so in the context of the practical effect of such restrictions. Based upon evidence similar to that presented to the District Court herein, the Court in *Purp'e Onion, Inc. v. Jackson,* 511 F.Supp. 1207 (N.D. Ga 1981), found that sites the city contended were "available" and "adequate" were either "unavailable, unusable, or so inaccessible to the public that for all practical considerations, they amounted to no locations." 511 F.Supp. at 1217. The Court concluded that isolating adult businesses to industrial areas which are not close to residential areas, are poorly lit, lack parking and where there is little traffic or retail business and which are inconvenient to customers, causing such businesses tc languish and fail, offends First Amendment principles. 511 F.Supp. at 1224. Morever, although it appears that the Court believed the ordinance's restrictive effect to be intended, it nonetheless concluded that if the "effect" of an ordinance is to suppress or significantly restrict access to protected materials, the ordinance is void for violation of the First Amendment, regardless of its intent.

In *Basiardanes v. City of Galveston,* 682 F.2d 1203 (5th Cir. 1982), the Court considered the same issue. There, the Court found that Galveston's ordinance banned adult theatres outright from all parts of the city except for certain undesirable industrial areas. 682 F.2d at 1214.[49]

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49. A quick glance at the aerial photograph and maps in the record, reveals that the practical effect of Renton's ordinance is the same. See Exhibit A-3, App. 142a and JA 215. Without question, adult theatres have been totally removed from the commercial areas of the city.

Rejecting the view of the District Court that the drawbacks of opening a movie theatre in an industrial area were simply the "reasonable economic burden that befalls some activity in every land use program," the Court concluded:

> [W]hen a claim of suppression of speech is raised, an exclusive focus on economic impact is improper. 'The inquiry for First Amendment purposes is not concerned with economic impact; rather, it looks only to the effect of this ordinance upon freedom of expression.' *American Mini Theatres,* 427 U.S. at 78, 96 S.Ct. at 2456 (Powell, J. concurring). 682 F.2d at 1214.

The court held that it was error to not consider the consequences to speech of confining adult theatres to "the most unattractive, inaccessible, and inconvenient areas of a city" citing *Deerfield Medical Center v. City of Deerfield Beach,* 661 F.2d 328, 336 (5th Cir. 1981), (holding that the restriction of abortion facilities to undesirable areas places a significant burden on a woman's decision to have an abortion.)

Justice Stevens in his dissent in *Metromedia, Inc. v. San Diego,* 453 U.S. 490, 553 (1981) developed a test which is useful in determining whether a zoning ordinance poses a threat to interests protected by the First Amendment.

> First, is there any reason to believe that the regulation is biased in favor of one point of view or another, or that it is a subtle method of regulating the controversial subjects that may be placed on the agenda for public debate? Second, is it fair to conclude that the market which remains open for the communication of both popular and unpopular ideas is ample and not threatened with gradually increasing restraints?

Subjecting Renton's ordinance to this test, it is clear that sexually oriented material is disfavored and that the purpose of the ordinance, as represented by the findings

adopted with the ordinance, is to protect the public from exposure to "adult" materials, even though they can only be viewed behind closed doors by an adult audience. With respect to the second question, Appellees submit that it is equally clear that the remaining market; i.e. the 520 acres, is not viable or adequate, and thus not ample. Additionally, the 520 acres is so remotely located that the quality of communication is burdened; i.e. a distributor's message will reach fewer people and persons seeking the message will have more difficulty finding it.

In resolving this issue, the Court must avoid mechanically applying percentages of land area or other equally rigid and insensitive tools. Because of the variety of "geographic configurations and types of commerce among neighboring communities," these issues must be resolved "on a case-by-case basis" giving deference to the sensitive First Amendment concerns. *Schad,* 452 U.S. at 78 (Blackmun, J., concurring). Any such rule must focus on "the effect of [the] ordinance upon freedom of expression." *Young,* 427 U.S. at 78 (Powell, J., concurring). Courts must be alert to the possibility of cities using the zoning power as a pretext for suppressing expression. Id. at 84.

The effect of Renton's ordinance is to close the door to the marketplace for adult theatres. It is not narrowly drawn to deal with the "secondary effects" of a single "adult" theatre by the least intrusive means. The locational restrictions of the ordinance are designed to dissuade all but the most venturesome from opening an "adult" theatre and all but the most determined patrons from seeking out such a theatre in order to satisfy their appetities for the materials offered. Consequently, the

ordinance imposes a substantial burden on access to the marketplace and is thus void as violative of the First Amendment.

IV. ISSUES NOT REACHED BY THE COURT OF APPEALS MANDATE AFFIRMANCE.

In addition to the reasons given by the Court of Appeals, adequate, other grounds exist to sustain a finding that Renton's ordinance is unconstitutional.

1. Applying The "Strict Scrutiny" Test, Renton's Ordinance Is Violative Of The Equal Protection Guarantees Of The Fourteenth Amendment

This ordinance impermissibly distinguishes between sexually explicit material presented in the format of a motion picture theatre, and sexually explicit material presented in the form of video tapes, burlesque theatres, and adult book and picture magazine stores, without any showing that the former is clearly more disruptive than the latter. See *Carey v. Brown,* 447 U.S. 445, 460 (1980). There, the Court said:

> When government regulation discriminates among speech-related activities in a public forum, the Equal Protection Clause mandates that the legislation be finely tailored to serve substantial state interests, and the justifications offered for any distinctions it draws must be carefully scrutinized. *Police Department of Chicago v. Mosley,* 408 U.S., at 98-99, 101; see *United States v. O'Brien,* 391 U.S. 367, 376-377 (1968); *William v. Rhodes,* 393 U.S. 23, 30-31 (1968); *Dunn v. Blumstein,* 405 U.S. 330, 342-343 (1972); *San Antonio Independent School Dist. v. Rodriguez,* 411 U.S. 1, 34, n.75 (1973). 447 U.S. at 461-62.

Here, under the guise of protecting children from exposure to adult materials, preserving land values, facilitating the ministry of churches and protecting the image of the

community from the location of "adult entertainment land uses," the city has selectively excluded adult motion picture theatres from the general commercial marketplace of Renton, even though it permits other adult entertainment land uses which are equally or more likely to intrude on the values it seeks to protect.

Renton asserts that the ordinance in question here is aimed at eliminating the alleged secondary effects of an adult theatre upon surrounding business communities and neighborhoods. Assuming such a purpose, the ordinance is under-inclusive and, therefore, violative of the equal protection clause of the Fourteenth Amendment for singling out only adult theatres when no specific adverse operational characteristics of such a theatre, as opposed to other forms of adult businesses, have been identified. The City cannot, consistent with the principles of the equal protection clause, fail to include within the scope of its ordinance video tape stores which sell and rent video tapes of the same movies which are exhibited on the screen at the Appellees' theatre. What justification can be offered to support a regulation which allows a particular titled film to be sold or rented at a store in downtown Renton when, at the same time, the same movie cannot be shown in a theatre located next door?

Appellees' motion picture theatre is similar in all respects to most general audience motion picture theatres throughout the United States. When patrons leave the theatre, they take with them nothing but their memory of the visual presentation. On the other hand, video tape stores in Renton, not subject to the restrictions of this ordinance, sell and rent video tapes of the same films exhibited at Appellees' theatre. Unlike a theatre patron, the patron of a video tape store takes the movie of his

choice away with him. From there, the movie may be introduced into the privacy of the home and may become readily and easily accessible to the very persons Renton seeks to protect from these materials.

Adult bookstores are similarly not covered by the restrictions of this ordinance. They sell graphic sexual material. Once again, the material leaves the premises and potentially becomes physically available to children and others who may inadvertently find it.

Video stores selling and renting sexually explicit video tapes and adult bookstores selling sexually explicit magazines and books are as much "adult entertainment land uses" as a motion picture theatre exhibiting sexually explicit films to an adult audience. This being so, the under-inclusiveness of the ordinance's restrictions would seem largely to undermine Renton's claim that the prohibition of only motion picture theatres from certain areas can be justified by the asserted state interests. *Carey v. Brown,* 447 U.S. at 465. See *Schad,* 452 U.S. at 79 (Powell, J., concurring). There is nothing in the record to suggest that there is something inherent in a motion picture theatre's operational characteristics that would make it more disruptive of the values the city seeks to protect than adult bookstores or video tape stores. In the context of free expression, the mode of expression is as entitled to protection as the expression itself. *Roaden v. Kentucky,* 413 U.S. 496 (1973); *Griswold v. State of Connecticut,* 391 U.S. 479 (1965); *Martin v. City of Struthers,* 319 U.S. 141 (1943); *Lovell v. City of Griffin,* 403 U.S. 444 (1938).

Absent a definitive showing that there is some operational characteristic of an adult theatre that is not involved in the operational characteristics of the adult video

store or adult bookstore, the classification is arbitrary, discriminatory and clearly unjustifiable. *Schad,* 452 U.S. at 71, is enlightening on this point. At footnote 10 of the opinion, Justice White writing for the majority, said:

> . . . He [Justice Powell] did not suggest that a municipality could validly exclude theatres from its commercial zones if it included other businesses presenting similar problems.

Police Department of Chicago v. Mosley, 408 U.S. 92 (1972), states a standard by which equal protection requirements in the First Amendment context must be measured. The Court in that case identified the "Crucial question" as "whether there is an appropriate governmental interest suitably furthered by the differential treatment." Id, at 95. The question here is whether Renton has a substantial interest in differentiating between a motion picture theatre presenting sexually explicit films to an adult audience and other adult entertainment land uses which are not subject to the same locational restrictions.[50]

No justification for this differential treatment has been offered and none exists in the record. While Renton may assert that the primary purpose of this ordinance is to maintain the residential character of its community, the

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50. In *City of Cleburne* v. *Cleburne Living Center,* — U.S. —, — S.Ct. — (1985), this Court invalidated, as applied, a zoning ordinance under which a group home for the mentally retarded was denied a special permit under the least demanding standard of equal protection review; i.e., "rationally related to a legitimate state interest." Reviewing the legislative history, this Court found that the ordinance was premised upon negative attitudes, fear and unsubstantiated factors, reasons insufficient for equal protection purposes for differential treatment. Other expressed concerns failed, in a similar manner, to justify differential treatment from other uses posing similar problems. In the instant case, the record below is equally as empty of reasons which would justify singling out adult theatres for locational restrictions while imposing no such restrictions on other similar uses.

broad restriction of banning adult theatres to the undeveloped industrial areas cannot be justified where the city has only selectively limited the commercial activity it finds objectionable. Renton's ordinance is not carefully drawn and "it is sufficiently over-inclusive and under-inclusive that any argument about the need to maintain the residential nature of this community fails as a justification." *Schad,* 452 U.S. at 79 (Powell, J., concurring). Renton's ordinance simply does not advance its asserted objectives in a manner consistent with the command of the equal protection clause. *Carey v. Brown,* 447 U.S. at 471. Accordingly, it must be found unconstitutional.

2. The Ordinance Is Unconstitutionally Vague

Appellants erroneously assert that the vagueness of Renton's ordinance is not at issue here.[51] The vagueness of Renton's ordinance is very much at issue.[52] An understanding of the issue is useful to understanding the restrictive and over broad reach of this ordinance.

Appellees, if the ordinance is upheld, must, of course, conform their motion picture exhibitions to the dictates of the ordinance. The ordinance, however, does not prohibit the exhibition of sexually explicit material in particular locations; rather, it prohibits the exhibition of such material as "a continuing course of conduct . . . in a manner which appeals to a prurient interest." (App. 96a). Determining what is a "continuing course of conduct" and "in a manner which appeals to a prurient interest" makes the ordinance unconstitutionally vague.

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51. Appellants' Brief at 18.

52. App. 21a. At footnote 19 to its opinion, the Court of Appeals said, "In view of our holding, we need not address the overbreadth or vagueness issues raised by Playtime."

> The ordinance defines "used" in the following way:
>
> "*Used*" The word "used" in the definition of "Adult Motion Picture Theatre" herein, describes a continuing course of conduct of exhibiting "specific sexual activities" and "specific anatomical area (sic) in a manner which appeals to a prurient interest.

In the setting of Appellees' business, how can Appellees be expected to know what those enforcing the ordinance will deem constitutes a "continuing course of conduct"? What does "in a manner which appeals to a prurient interest" mean? The confusion created by the vagueness of these phrases is dramatically exhibited by the testimony of the Planning Director, the responsible official of the City of Renton charged with enforcement of the ordinance. When asked what percentage of a theatre's film fare would have to be of the defined type, in a six-month period of operation, before a theatre would be an "adult" motion picture theater, the Planning Director responded, "over half."[53] He went on to indicate that alternating weeks of general and adult fare would not necessarily be violative of the ordinance.[54] However, at the same time, the matter could be referred to the City Council for their determination because they have the ultimate authority to make the decision.[55] In other words, the City Council is vested with unfettered discretionary authority to determine what "continuous course of conduct" means since the ordinance is silent with respect to a definition. There are no objective standards upon which the Council's determination rests. Additionally, the Planning Director makes clear that "half of the time" does not mean "half of the time"; rather, it means what he or the council chooses it to

53. Appendix B to Brief at App. 9-10. This material is found in the record as Appendix D to Appellants' Opening Brief filed in the Court of Appeals in Cause No. 83-3805.
54. Id. at App. 10-11.
55. Id. at App. 11-12.

mean.[56] He indicated that a program consisting of one hundred minutes of general release film fare and sixty minutes of adult film fare would be violative of the ordinance, even though less than half of the films, both in number and duration, constituted films subject to the regulations of the ordinance.[57]

The meaning of "in a manner which appeals to a prurient interest" is similarly vague. In the context of the definition of "used," where these words appear, does this language modify the manner of exhibition? In other words, is it the manner of presentation and/or advertising that become the operative criteria for evaluation? Syntactically, this would seem to be the meaning. The city's answers to interrogatories highlights the uncertainty one is faced with in attempting to determine the meaning of these words. The city states that application of its ordinance does not turn on whether Appellees exhibit motion pictures.[58] Since all Appellees do is exhibit motion pictures, arguably the ordinance, as interpreted by the city, does not apply to Appellees at all. Another interrogatory required Renton to state the facts it would rely on to prove that motion pictures were exhibited "in a manner which appeals to a prurient interest." Renton's answer suggests that its ordinance is violated if sexually graphic matter is exhibited and it is advertised so as to appeal to the *erotic* interest of customers.[59] This response appears to suggest that the exhibition of sexually explicit graphic

56. Id.
57. Id. at App. 12.
58. Appendix C to Brief at App. 14, Interrogatory No. 1. This material is found in the record as Appendix E to "Appellants' Opening Brief filed in the Court of Appeals in Cause No. 83-3805.
59. Id., Interrogatory No. 2.

matter, of any nature, is permitted so long as the advertising of the business does not appeal to the erotic interest of its customers. In answer to another interrogatory, Renton clearly states that the movies are not the issue.[60] If the movies are not the issue, what does this ordinance deal with? What type of exhibition is prohibited? How is it that one violates the mandate of the ordinance if the motion pictures themselves are not the primary determinative factor of whether they "appeal to a prurient interest"?

Part of the definition of "used" includes a portion of the test for determining whether press materials are obscene within the penumbra of the First Amendment. See *Miller v. California,* 413 U.S. 15, 24. See also, *Brockett v. Spokane Arcades, Inc.,* 472 U.S. —— (1985). Although Renton's ordinance requires proof of an appeal to the "prurient interest," that term is nowhere defined in the ordinance. However, the city, speaking authoritatively through its Planning Director, defines prurient in terms of "lewdness" and "unwholesome." Lewd, as defined by the Planning Director, means *depiction* of sexual acts or nudity and violence. "Unwholesome" involves a determination of whether the activities are ones which *the community* expressed as being of concern to them as the city was developing the ordinance in question here.[61]

The dilemma faced by Appellee in attempting to conform their exhibitions to the ordinance is immediately apparent. If, as part of their film fare, they exhibit sexually-oriented visual media, the City of Renton may conclude,

60. Id. at App. 15, Interrogatory No. 3.

61. Appendix B to Brief at App. 4-8. These definitions are certainly much broader than permitted in *Brockett v. Spokane Arcades, Inc., supra,* where this Court held that "prurient interest" meant "shameful or morbid" and could not be equated with "lust" and a normal healthy interest in sex.

based upon uncertain standards, that they are doing so as a "continuing course of conduct," or by using an impermissably vague and overbroad definition, that they are doing so in a manner that "appeals to a prurient interest."

The section of Ordinance No. 3637 that defines "used" is clearly "void for vagueness." It does not provide:

> . . . sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement. (Citations omitted). Although the doctrine focuses both on actual notice to citizens and arbitrary enforcement, we have recognized recently that the more important aspect of the vagueness doctrine "is not actual notice, but the other principal element of the doctrine — the requirement that a legislature establish minimal guidelines to govern law enforcement." *Kolendar v. Lawson,* 461 U.S. 352, 103 S.Ct. 1855 (1983).

The definitions involved here have a substantial impact on First Amendment expression and are subject to the strictest review because the ordinance authorizes the abatement and closing of a theatre exhibiting constitutionally protected materials. Additionally, the very vagueness of the meaning Renton attaches to the operative phrases will necessarily result in nonjudicial self-censorship of nonobscene works because the line separating continuous from noncontinuous and prurient from nonprurient is left to the standardless, discretionary determinations of the Renton City Council and its Planning Director. For these reasons, Renton's ordinance is unconstitutionally vague.

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CONCLUSION

For all of the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

/s/ JACK R. BURNS*
Burns & Hammerly, P.S.

*Counsel of Record

APPENDIX A

CITY MANAGER
(509) 515-3404
Sean 726-3404

City
of
PASCO

P.O. Box 293 412 West Clark Pasco, Washington 99301

June 9, 1980

Mr. Erling Mork
City Manager
930 Tacoma Avenue, S.
Tacoma, Washington 98402

Dear Erling:

This is just a note to tell you that the City administration here — Council and Staff — have worked with Roger Forbes of the Playtime Theaters, Inc. and with Jack Burns, his attorney.

Mr. Forbes took over an old run-down theater here in Pasco and began to operate it as an adult theater. All this began about three years ago, a year or so before I joined the City team. As in your city, this new operation caused a "knee jerk" reaction here, too. There was a hue and a cry, so they tell me, about the alleged effect of showing adult films.

The City retroactively tried to zone the operation out of existence and wound up in Federal District Court in Spokane, where the matter languished on the docket for many months. The City meanwhile was trying to decide how to get a war chest together to continue the battle in the courts.

While all of this was happening, the adult theater was gaining acceptance and the die-hard moralists began to fade out of the picture. People were going to the theater and Forbes was making money on the operation. About this time, the City Council changed its attitude about the

Theater and decided to dismiss some pending local obscenity charges, Forbes agreed to dismiss the suit, and in return for the receipt of a non-conforming use permit, agreed to substantially modernize the building, a project that is now well underway.

In all of this, we have found Mr. Forbes to be an open and above-board businessman. His adult theater (the only one in town) has not ruined adjoining businesses, and from what I can gather from my city hall vantage point, people around here have accepted the Theater and now have very little adverse to say about it. As a matter of fact, I have not had a single complaint about the operation in about a year.

I am not a proponent of adult theaters, nor is our Council. We are neither for or against them. We simply take the view that people do go to adult film theaters and that it is their right to do so. Others that do not care for this type of film fare are not required to enter the premises. The remodeling which will draw to completion soon will create an unostentatious facade which should not infringe on the sensibilities of either crowd — those that go to see adult films and the others that do not.

Although originally very nervous about this operation, our Council now seems very cool about the whole thing, and so far as downtown Pasco is concerned, accepts Roger Forbes as just another businessman who is making a substantial capital outlay to remove what was before a real eyesore.

Best wishes.

Sincerely,
/s/ LEE F. KRAFT
Leland F. Kraft
City Manager

APPENDIX B

(p. 41) Q. Last weekend. And would you tell us in viewing the film, in what way did the movie "Deep Throat" appeal to your prurient interest, as you perceive — appeal to your prurient interest as you perceive it?

A. The — well, my definition of prurient interest is gleaned from Webster's which speaks basically to lewdness or, I can't think of the second one.

Q. Lascivious?

A. Nope. That's not the one I'm thinking of. It is on my tongue. Unwholesome.

Q. Okay. When did you look at Webster's dictionary to ascertain their meaning?

A. Since the time of the film — actually having reviewed the film.

Q. Since last weekend.

A. Yes.

Q. Did you look at it today?

A. Yes.

Q. Did you look at it after the hour of 11:30 today?

A. Yes.

Q. Did you do that in the company or at the request of your attorneys?

MR. BARBER: Objection. It is a privileged (p. 42) matter.

MR. SMITH: Are you telling him not to answer?

MR. BARBER: Let's see.

(Discussion off the record)

MR. BARBER: We won't waive the objection, but go ahead and answer.

A. Yes.

BY MR. SMITH:

Q. Which is it, at the request of your attorneys or in their company?

MR. BARBER: Same objection.

A. I don't recall which it was.

BY MR. SMITH:

Q. As I look at this Ordinance and assuming that I — let's assume that I wanted to know where — how the City Council defined "prurient," would you point to me in the Ordinance, either the first or second Ordinance for 1982, where the word "prurient interest" is defined, if at all?

A. I don't believe that's defined in the Ordinance.

Q. How would one, as you perceive it, as a representative of the City of Renton and Director of Policy, how would you deal with someone who came in and said "what is it you mean by prurient," would you (p. 43) point them to a dictionary, point them to law book, send them to the City Attorneys Office, what would you do?

A. Certainly start with a dictionary, that would be a standard practice.

Q. And is that a standard practice that you would follow in generally areas of perhaps ambiguous definitions —

A. Yes.

Q. And it is then your perception the dictionary definition of prurient is the definition you, as the Director of Policy, would apply in ascertaining whether a proposed use would be an adult motion picture theater?

A. Yes.

Q. All right. Now, how then, would you tell us now, utilizing your definition that you say you got from Webster's — and, by the way, which Webster's and what edition?

A. New Collegiate.

Q. New Collegiate. Was it the 12th edition or —

A. I have no idea.

Q. You didn't go to the big Webster's dictionary or one that's the 3rd or 4th edition that's about 3,000 pages big?

(p. 44) A. No.

Q. Talking about the —

A. It is—

Q. — smaller one about —

A. Three inches.

Q. Okay.

A. In thickness. That's the standard document in our library.

Q. Then tell me how did you, using "Deep Throat," with the movie that you have had at least two exposures to, how is that — how would that be prurient as you perceived under the operational definition you have applied of lewdness or unwholesome?

A. The majority of the film exhibits or depicts activities which I would, first of all, defined as pornographic as we discussed earlier, and by their content would come under the category of being lewd or unwholesome.

Q. What is it you understand as meant by "lewd"?

A. I suppose that my working definition would be that it is essentially that which I visualize as being pornographic.

Q. Well, and pornographic is that which you visualize as depicting sexual acts or nudity, correct?

A. And including violence.

(p. 45) Q. Well, you said violence was not a component of it.

A. No.

Q. I asked you whether there was any difference between your perception of sexual acts with or without violence, do you remember that discussion, and you said there was none?

A. No. My recollection was that I stated that you didn't — that use of sex in a violent manner was an additional component.

Q. And then — you indeed said that. But then I asked you, did I not, by your definition of pornographic material and the delineation of sex acts, wouldn't that be the same

whether there was violence included or not included, you would consider it all pornographic?

A. I guess in my own mind, I see some distinction between the three: nudity, sexual contact and violent — sexual content in a violent fashion as being three separate items. The two may be together, but I visualize them as a third component.

Q. And your working definition of "lewd" is that which you visualize as pornographic; is that correct?

A. Yes.

Q. And "pornographic" is that which involves nudity or (p. 46) some sex act, be it violent or nonviolent, correct?

A. Yes.

Q. Now, taking the definition of the concept of the word used, do you see there where it says "exhibiting specific sexual activities and specified anatomical areas" — "area," do you see that?

A. Yes.

Q. And isn't that as I understand it, what you have visualized as being pornographic, i.e., nudity and/or sexual acts; is that correct?

A. Yes.

Q. Now, if material which shows specific sexual activities and specific anatomical areas by your working definition is lewd, ergo it is also prurient; is that correct?

A. I don't — I'm not sure that I would make that explicit a connection.

Q. No pun intended on "explicit," of course. All right. Well, as I followed your rationale, you defined lewdness as that working definition as you visualize depict nudity or sex acts, correct?

A. Yes.

Q. All right. And in the Ordinance, you have defined specific sexual activity and specified anatomical areas, correct?

(p. 47) A. Yes.

Q. And those would include the two components of nudity and sexual acts, would they not?

A. Yes.

Q. Ergo, anything with which has nudity or sexual acts would be lewd, ergo, be prurient, is that not correct, by the definition you have just given us?

A. I think it is important to connect both the concept of lewdness and unwholesomeness to meet my full definition of what prurient would be.

Q. You hadn't given us that on your working definition of lewdness, that's another component you are adding now; is that correct?

A. I'm not sure that I am adding it, but it certainly is a consideration.

Q. By your definition, then something can be lewd but not per se be unwholesome; is that what you're saying?

MR. BARBER: I want to object just to the form of the question. Becoming confusing. I think we are just delving into semantics, but go ahead and answer.

BY MR. SMITH:

Q. If you say you had to add unwholesome to the lewdness to get the full impact of your definition, then by

* * *

(p. 58) the connection of the story — story line.

Q. Let me ask you. Does the story line play no part of determination of whether it is an adult film or nonadult film as we have been using that term here today?

A. It certainly plays a part, yes.

Q. Plays a part?

A. Yes.

Q. Okay. Whether the part it plays is dependent on how solid the story line is; is that what you are suggesting?

A. As well as its content.

Q. As well as its content. All right. Now, suppose our hypothetical John Doe who wanted to ascertain whether or not this Roxy Theater he is about to rent would be required to be classified as an adult theater, and if so, then he couldn't obviously operate it at that location by your concerns and standards. Suppose he said, "Okay, I'm going to show some movies of the type that you have described, going to show specific sexual activities and of a type that might not be approved of by the majority of the citizens of the City of Renton. In a six-month period of time of operation, how many — what percentage of the film fare would have to be of that type before you would

(p. 59) consider me to be an adult motion picture theater?" what would you tell him?

A. Without thinking about it for a long, long time, would certainly think over half.

Q. Over half. Now, if he is open one week and shows one film and that film is of the category you described or we hypothetically chatted about here, where there was specific sexual activity of the type that was — would be disapproved of by a majority of the citizens of Renton, would that one week, one single showing of one film make it an adult motion picture theater as you perceive it under the Ordinance?

A. Not if — I would think not if weeks prior and weeks subsequent contained general fare —

Q. Only — that was the first and only film that was shown in one week, during that week it would be an adult motion picture theater because it was the only film; is that correct?

A. I think this crucial aspect is continuing course of conduct.

Q. How long must the conduct continue, as you read and understand the Ordinance, before the regular showing of such film fare would raise the theater to the level of an adult motion picture theater as defined — as you would understand defined under the Ordinance?

(p. 60) MR. BARBER: I object to that. I think it's been asked and answered.

MR. SMITH: I don't think so. I don't remember.

MR. BURNS: No.

(Discussion off the record)

BY MR. SMITH:

Q. After consultation with your attorney, do you have an answer?

A. The — I would think that if we were talking about alternating weeks of general fare and adult theater fare, that it would be raised before the City Council. Ultimately has the authority to make the determination as to whether to proceed with injunctive relief.

Q. But is there anything as you read the Ordinance that tells us that in advance, anything that speaks to alternating weeks? Is there anything that would tell me in advance whether I would be classified as an adult motion picture theater?

A. As I indicated earlier, I would say half the time, exceeding half the time would be my definition of that.

Q. The question is is there anything in the Ordinance that tells me that without reference to your (p. 61) perception, would you look at the Ordinance again, anything in the Ordinance that tells me that?

A. I would think that the layman's understanding of continuing course of conduct would be most of the time.

Q. Most of the time.

A. Or exceeding half of the time.

Q. Exceeding half of the time. But in the instance of alternating 50/50, which does not exceed half of the time, you would say that this would then be, as you understand it, called to the City Council's attention for their determination whether or not to proceed to close the place down as a public nuisance; is that correct?

A. Yes.

Q. So could be less than — that could be — that could be at least 50 percent or less of the time, correct?

A. Obviously depending on which week it was under consideration it might be 49 or 51 percent.

Q. I understand. But yet there is nothing within the definitional standard set forth in the Ordinance that would tell us that in advance, is there?

A. Only to the extent that I think most people would understand in the terms of continuing course of conduct.

(p. 62) Q. How about the concept of — suppose I said, "sir, I don't want to offend your law and I don't want to spend a lot of money opening the Roxy Theater. If I am going to be classified as an adult film theater because then I can't operate, so I will tell you what I am going to do. Show one adult film, followed by one general release film, followed by one Mickey Mouse cartoon. I will show three films and this will take a total of three and a half hours to show and the general release film would be 90 minutes, adult film 60 minutes and Mickey Mouse will be ten minutes. Am I an adult theater?"

A. I would think that it would be. Under the definition that's in the Ordinance of continuing course of conduct, that that same film fare was being shown week in, week out, continuously.

Q. Even though it constituted 60 minutes vs. 100 minutes of nonadult film fare; is that correct?

A. Yes.

Q. So it is the repetition of showing one film, even though it may be less than 50 percent of the total program,

that you in your mind would trigger the operation of the Ordinance and thus make our hypothetical theater an adult theater?

A. The ultimate decision is not mine.

(p. 63) Q. I understand. But—

A. But the point where adult film fare was being shown every day, continuously, even though it is interspersed, the matter would be brought to the City Council for their review and decision.

Q. Well, if the important decision is not yours, why are you looking at all these adult films now?

MR. BARBER: I object. That's argumentative.

MR. SMITH: It is not argumentative. We think it is a question of if he is now abdicating the responsibility for making any important decisions on the issue, why is he looking at the adult films?

MR. BARBER: It is an argumentative question. You can answer, if you can.

A. Someone has to make the quantitative analysis of the content of the films for presentation to the Council. It fell to me.

BY MR. SMITH:

Q. And when do you make that presentation?

A. I'm not sure when it is going to occur, as a result of this particular litigation, but if we were not speaking in terms of this litigation, it would probably occur after some reasonable period of time has elapsed and continuing course of action on the

APPENDIX C

INTERROGATORY NO. 1: Do the Plaintiffs contend that the motion pictures exhibited at the Renton Theatre since January 20, 1983 are exhibited in a manner which appeals to a prurient interest.

ANSWER: Plaintiff's contention as to the cause of action which is being tried herein (Ordinance No. 3526, as amended) is that Defendants, at the Renton Theater, since January 20, 1983 have been engaged in a continuous course of conduct of *exhibiting "specified sexual activities" and "specified anatomical areas"* (as distinguished from "motion picture") *in a manner which appeals to a* prurient interest. Answer to Interrogatory No. 2 and 3 further explain answer to 1.

INTERROGATORY NO. 2: If your answer to the foregoing Interrogatory is in the affirmative, state each and every fact, or contention (factual or legal) upon which the Plaintiffs will rely to prove that the motion pictures were exhibited in a manner which appeals to a prurient interest.

ANSWER: Advertisements of films in newspapers, on the theater marquee and in the previews of films to be exhibited in the future at the Renton Theater. The actual "specified sexual activities" and "specified anatomical areas" depicted in the motion picture films themselves. The continuous exhibition of adult film fare at the Renton Theater which tends to advertise the availability of sexually explicit material to be exhibited in the future at the Renton Theater. The foregoing facts establish that the Renton Theater is being used as a business to purvey sexually explicit graphic matter which is openly advertised to appeal to the erotic interest of its customers, or the unhealthy or unwholesome interest in erotic material.

INTERROGATORY NO. 3: Do the Plaintiffs contend that the motion pictures exhibited at the Renton Theatre since January 20, 1983 appeal to a prurient interest?

ANSWER: Yes. For purposes of the proceedings before the court, the Plaintiffs contend that the question of whether the motion pictures themselves appeal to a prurient interest is not the issue. Rather, the issue is whether the manner in which the "specified sexual activities" and "specified anatomical areas" are exhibited at the Renton Theater is a continuing course of conduct of appealing to a prurient interest.